

IEPR COMMITTEE WORKSHOP ON CLEAN COAL TECHNOLOGY AND ELECTRICITY IMPORTS

Overview of Constitutional Limitations on Out-of-State Procurement Criteria

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“To what degree should procurement decisions for out-of-state electricity consider and/or require mitigation for: emissions of criteria and toxic air pollutants; greenhouse gas emissions; and water and waste impacts?”

Scope – Two Types of Procurement Criteria

- (1) Specified environmental controls or mitigation: e.g., “coal-fired powerplants must be IGCC and use dry cooling,” or “coal-fired powerplants must sequester carbon.” *Probably constitutionally-invalid “extraterritorial regulation,” even if criteria applied equally to in-state and out-of-state plants.*
- (2) Specified environmental performance criteria (e.g., a plant must emit no more than X (net) tons of CO₂ per MWh). *Probably constitutional, if applied in a nondiscriminatory manner to in-state and out-of-state powerplants, and if reasonably related to potential harms occurring in California.*

Covers IOUs Only

State can affect procurement decisions of ESPs, munis, but currently easiest legally and least controversial for CPUC regulation of IOUs.

FERC Jurisdiction?

Procurement criteria would not conflict with FERC's jurisdiction over interstate wholesale sales and transmission

Commerce Clause – General Principles

“The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States”

(U.S. Constitution, article I, section 8, clause 3.)

Literally establishes only Congressional power, but Supreme Court has said it also prevents States from discriminating against, or unduly burdening, interstate commerce. Called “Negative” or “Dormant” Commerce Clause.

The Two Dormant Commerce Clause Tests

- (1) “Strict Scrutiny” for state actions that expressly or in effect discriminate. Economic discrimination is “virtually per se invalid.”
- (2) “Balancing test,” weighing state interests against incidental burdens on interstate commerce, for nondiscriminatory actions.

Characterization of state action, and resulting choice of test, is crucial: only one case has applied strict scrutiny and upheld a state action. But “there is no ‘clear line’” distinguishing the two.

Strict Scrutiny Cases

- (1) New Jersey statute banning importation of waste from other states – unconstitutional. (437 U.S. 617.) Court found alleged health and safety rationale unconvincing, because in-state and out-of-state waste had the same impacts.
- (2) Oregon tax on waste, higher for out-of-state than in-state – unconstitutional. (511 U.S. 93.)
- (3) Maine statute banning importation of live baitfish – constitutional. (477 U.S. 131.) Out-of-state baitfish were nonnative and carried parasites not found on native species; no available alternatives to prevent the harm to Maine environment.

California Lessons from the Strict Scrutiny Cases

- Avoid discrimination, express or in effect.
 - Don't say "Wyoming coal" (express discrimination) or even "coal-fired plants" (likely to be discriminatory in effect)
- Size of effect on interstate commerce is irrelevant if state action is discriminatory (size is important for non-discriminatory, "balancing test" cases)

Balancing Test Cases

- Arizona statute requiring specified packaging for cantaloupes – unconstitutional because it would have required an Arizona grower to construct its own packing facility (\$200K), rather than ship cantaloupes to California for packing. (397 U.S. 137.) Court characterized Arizona's interest in "preserving growers' reputations" as minimal.
- Minnesota statute banning plastic unreturnable milk containers – constitutional. (449 U.S. 456.) Important state interest in resource and energy conservation; outweighed greater burden placed on out-of-state container manufacturers.

California Lessons from the Balancing Test Cases

- Flexible; difficult to predict outcomes
- Courts carefully examine legitimacy of state interest and relationship between state action and the achievement of that interest
- Courts also carefully examine effects in-state and out-of state
- California should create a good record on these issues

Another Legal Principle: No Extraterritorial Regulation

- We have seen that states can't discriminate against or unduly burden interstate commerce
- Also, one state can't regulate activities in other states. California couldn't directly require specific technologies or mitigation in other states.

A Change in the Court?

- Justice O'Connor tended to vote more often for striking down state actions than do the more conservative justices, but it would be highly speculative to predict a substantial change as a result of her retirement.

Bottom Lines for California Procurement Criteria: (1)

- Direct requirements for out-of-state environmental controls or mitigation would most likely be unconstitutional.

Bottom Lines for California Procurement Criteria: (2)

- Ensure use of balancing test, not strict scrutiny, by avoiding criteria with facial or in-effect discrimination:
 - Don't say "Wyoming coal": express discrimination
 - Don't say "coal-fired plants": could be discrimination in effect
 - Use environmental performance (e.g., tons/MWh)
 - Apply to in-state and out-of-state purchases
 - Should not be set at a level that will discriminate against out-of-state in effect (e.g., too stringent for out-of-state plants to meet)

Bottom Lines for California Procurement Criteria: (3)

- Establish record of California's interest in the criteria:
 - What environmental, safety, economic, etc. harms does California suffer from purchases from out-of-state (and in-state) plants that have various levels of CO₂, acid rain, water use, etc.?
 - CO₂ effects can be global; acid rain perhaps regional; water use probably local.
 - In addition, environmental characteristics could have future economic costs (CO₂ tax, powerplant can't operate because of lack of water)
- Crucial no matter whether Legislature, CPUC, etc. adopts criteria

Bottom Lines for California Procurement Criteria: (4)

- Assess in-state and out-of-state effects; weigh adverse effects on interstate commerce versus state's interests.